Filed 3/7/19 P. v. Gubins CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TORVALDS GUBINS, Defendant and Appellant.	B288418 (Los Angeles County Super. Ct. No. LA042908)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christine Ewell, Judge (Ret.). Affirmed.

Robert G. Berke, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews,

Supervising Deputy Attorney General, Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

Torvalds Gubins appeals from the trial court's January 23, 2018 order denying his motion to vacate his April 22, 2005 no contest plea to kidnapping (Pen. Code, § 207, subd. (a)),[1] pursuant to sections 1016.5 and 1473.7.

Gubins argues, as he did in his prior appeal to this court in *People v. Gubins* (Mar. 22, 2016, No. B265703) [nonpub. opn.],[2] that the plea court failed to fully advise him of the immigration consequences of his plea, as mandated by section 1016.5, and that he was prejudiced by the defective warning. He further argues that his conviction is legally invalid because the combination of the plea court's defective warnings and his counsel's ineffective assistance damaged his "ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences" of his no contest plea under section 1473.7.

We affirm the trial court's order denying the motion to vacate.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] We take judicial notice of our prior opinion.

FACTS AND PROCEDURAL HISTORY

Gubins, who was born in Latvia at the time it was part of the former Union of Soviet Socialist Republics (USSR), entered the United States on a four-month temporary visa in 1950, when he was approximately eight years old.

On August 27, 2001, he was convicted of forgery, a crime of moral turpitude under INA section 237, subdivision (a)(2)(A)(ii), and sentenced to three years in prison.

In 2004, Gubins was charged with one count of conspiracy to commit kidnap for ransom and extortion (§ 182, subd. (a)(1)), and three counts of kidnapping for ransom (§ 209, subd. (a)). It was alleged that in April of 2003, Gubins participated in the kidnapping of a family of three, including an 11-year-old child, at gunpoint. The mother and child were bound, gagged, and held captive in a warehouse. The father was strapped with a device that he was told was an explosive. The kidnappers threatened to kill the entire family if they were not given $200,000. Gubins's maximum exposure for the charged crimes was three life sentences.

On April 22, 2005, Gubins pleaded no contest to a single count of simple kidnapping (§ 207, subd. (a)), for which he was to receive the middle term of five years in prison. Simple kidnapping is a crime of moral turpitude and an aggravated felony under INA section subdivision (a)(2)(A)(ii) and (iii). At the plea hearing, the prosecutor advised Gubins: "If you are not a citizen of the United

States, you are hereby advised that conviction of this offense will result in deportation, denial of re-entry, denial of amnesty. Do you understand?" Gubins responded, "Yes." He was not given any other advisements regarding immigration consequences prior to pleading no contest, and the record does not contain a written waiver acknowledging his understanding of the immigration consequences of his plea.

On October 2, 2008, Gubins was placed in removal proceedings on the independent bases that he had been: (1) convicted of two crimes of moral turpitude (the 2001 forgery conviction and the 2005 kidnapping conviction), and (2) convicted of an aggravated felony (the 2005 kidnapping conviction).

On May 6, 2009, Gubins was ordered removed from the United States to Latvia. His applications for withholding of removal and protection under the Convention Against Torture were denied. Because Latvia was part of the former USSR at the time he emigrated, Latvia deemed him a citizen of the USSR and refused to recognize him as a citizen. ICE was unable to effect Gubins's removal within the prescribed period, and instead placed him under supervision and permitted him to remain at large, subject to certain conditions, including periodic check-ins with immigration authorities.

Several years later, Gubins filed a motion to vacate his 2005 plea, claiming that he was inadequately advised of the

immigration consequences of his plea under section 1016.5.[3] The court denied the motion without prejudice on January 26, 2015, "pending a declaration from [his] defense attorney . . . indicating, if true that he did not advise the defendant of the immigration consequences."[4]

Gubins appealed to this court. (*People v. Gubins* (Mar. 22, 2016, No. B265703) [nonpub. opn.].) After reviewing the record on appeal, we determined that the record was inadequate because it did not include either Gubins's section 1016.5 motion or a reporter's transcript of the plea colloquy containing the immigration consequences advisement on which the motion was based. We informed the parties that the section 1016.5 motion was subject to summary affirmance if the inadequacy was not remedied. Gubins claimed the record was adequate for review and did not move to correct or augment the record. (*Id.* at p. *1.) Because the burden of establishing both timeliness and error

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[3] The exact date on which the motion was filed is not contained in the record. In light of the fact that the trial court made its ruling on January 26, 2015, we presume the motion was made in late 2014 or early 2015.

[4] Neither the motion nor the hearing on the motion is contained in the record. The condition of the court's denial is contained in the court's minute order, dated January 26, 2015. Our information regarding the contention raised in the motion is based on the court's opinion and representations the parties made in the briefs in *People v. Gubins* (Mar. 22, 2016, No. B265703) [nonpub. opn.].

lay with Gubins, we affirmed the trial court's order denying his motion to vacate the plea. (*Id.* at p. *2.) We noted that "the record presented contains no declaration from Gubins setting forth his immigration status, what he understood regarding the immigration consequences of his plea, why he waited ten years to file his motion to vacate, and how he suffered prejudice. (*People v. Martinez* (2013) 57 Cal.4th 555, 567 [relief under section 1016.5 may be granted if defendant convinces the court he would have rejected a plea offer if properly advised]; *People v. Kim* (2009) 45 Cal.4th 1078, 1096–1097 [(*Kim*)] [burden is on defendant to diligently seek relief and justify undue delay]; *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 198 [defendant must establish a failure to properly advise of immigration consequences and that he would not have entered the plea had he known the consequence].)" (*Id.* at p. *2.)

Gubins filed a second motion to vacate the 2005 plea on September 20, 2017, again arguing that the court inadequately advised him of the immigration consequences of his 2005 plea under section 1016.5. Gubins specifically argued that although he was given two of the three advisements required under the statute, he was not advised that he could be excluded from admission and he was prejudiced by that omission. He also claimed that he received constitutionally ineffective assistance from his plea counsel under newly enacted section 1473.7 because counsel incorrectly advised him that the admonition regarding

possible immigration consequences given during the plea colloquy was "'no big thing'" and "just something the court was required to say to everyone." Gubins did not submit a declaration from his defense attorney regarding the advice he gave Gubins with respect to the immigration consequences of his plea, as was required before he would be permitted to file the second motion to vacate per the trial court's January 26, 2015 ruling.

The People responded that the advisements substantially complied with the requirements of section 1016.5 because "denied re-entry" was functionally equivalent to "excluded from admission." Regardless, Gubins failed to establish prejudice because he conceded that he was properly advised that he could be deported. Gubins did not argue that although he was "comfortable" with deportation and denial of re-entry he would not have pleaded no contest if he had known that he would be denied admission while physically in the United States, and any future argument to that effect would be disingenuous. With respect to Gubins's ineffective assistance of counsel claim, the People argued that it was highly unlikely that his attorney would have provided different advice if the plea court had used the term "exclusion" rather than "re-entry" and Gubins "would have relied on the advice just as he has."

In a hearing on October 18, 2017, the trial court noted that in addition to the motion to vacate denied in 2015, Gubins had filed a writ of corum nobis in 2008, claiming that he was inadequately advised of the immigration

consequences of his 2005 plea under section 1016.5, which was denied.[5] The trial court questioned defense counsel, "Why do you think you're right on [section 1016.5] this time when you weren't right the last two times?" Counsel represented that "because the Legislature gave us [section] 1473.7 . . . we've got a compound issue at this point under 1473.7 which has never been argued before the court." The trial court responded, "Well, we will look at the file when we ultimately obtain it. And I trust in there I'm going to find something that indicates that this is anything other than an attempt to relitigate something that has been repeatedly litigated in this case, and that this is not just an improper motion for reconsideration."

On January 23, 2018, a hearing was held on the motion to vacate. The trial court informed the parties that it intended to deny the motion and gave its tentative ruling. It ruled that the plea court substantially complied with section 1016.5 in advising Gubins of the immigration consequences of his plea. The trial court relied on the holding in *People v. Gutierrez* (2003) 106 Cal.App.4th 169, that exclusion from admission and denial of re-entry were functionally equivalent. Regardless, there was no prejudice because Gubins was advised that he would be deported, stated that he understood deportation was a consequence of his conviction, and was subsequently ordered deported. The

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[5] The writ of corum nobis is not part of the record on appeal.

court also ruled that the motion was untimely. Gubins was ordered deported in 2009, but did not file a motion to vacate for many years. The trial court was not persuaded by Gubins's argument that he would not have pleaded no contest had he been properly advised, because there was no reasonable basis to do so—he pleaded no contest in exchange for a five-year sentence but faced three life sentences if he went to trial.

Defense counsel argued that the advisement given to Gubins prior to his plea was not in substantial compliance with section 1016.5, because the plea court failed to advise him that he could be excluded from admission or that he could be denied naturalization. The prosecutor correctly noted that Gubins had conceded he was properly advised regarding the possible denial of naturalization in his brief, and stated that he did not address it in the response for that reason. Defense counsel next argued that prejudice must be assessed not by looking at whether Gubins got a "good deal," but rather "are the potential consequences of this deal such that he might have taken a chance with trial?" He cited to the fact that Gubins filed multiple motions alleging ineffective assistance of counsel after the plea as evidence that Gubins would have gone to trial had he been properly advised. The motions showed that he was "trying to get that plea set aside almost from the minute he entered it."[6] He

[6] Counsel acknowledged that none of the motions mentioned concerned the issues before the trial court.

argued that the motions also "[went] to timeliness. There may have been a lack of effect but there's no lack of desire from all those filings that Mr. Gubins did almost from the time he was sentenced on. [¶] So there's been diligence, there's been efforts . . . ." With respect to the section 1473.7 issue, counsel argued that the statute was only passed a few months before Gubins filed the instant motion, "[s]o he moved pretty quick [*sic*]." He argued that Gubins was prejudiced because he "forfeit[ed] his right to be admitted" through the mechanism of adjustment of status, and his legal status and naturalization were "taken away from him." Gubins was prevented from collecting social security earnings and would "have to work with his hands and his back" into old age. Finally, counsel argued that section 1016.5 and section 1473.7 were not "necessarily mutually exclusive," such that the 1016.5 violation is "evidence that can be used [to withdraw a plea under section 1473.7], and it's a mere preponderance standard under [section] 1473.7."

The People pointed out that Gubins had not raised the issue of naturalization in the briefing and submitted on their brief.

The trial court adopted its tentative ruling denying the motion to vacate. It added that the case "in large part come[s] down to social security," and with respect to that issue "there's no statutory right to be advised that he may lose his social security based upon a plea in the case." Gubins faced the possibility of three life sentences, but "'only'" received "five years in state prison and he's still

living in the United States. He may have to check in periodically, but he does not appear to be going anywhere."

DISCUSSION[7]

Section 1016.5

Section 1016.5, subdivision (a), requires a court to advise a defendant on the record and prior to taking his or her plea: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Section 1016. 5, subdivision (b) provides that if "the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the

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[7] Prior to briefing, we sent a letter to the parties inviting them to address the issue of whether Gubins was required to obtain a certificate of probable cause. We agree with the parties that a certificate of probable cause is not required to appeal a motion to vacate a plea under section 1016.5 or section 1473.7. (See *People v. Arriaga* (2014) 58 Cal.4th 950, 960; § 1473.7, subd. (f).)

court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty." "[T]o obtain that relief, the following must be present: the defendant was not properly advised of the immigration consequences of the plea as required by section 1016.5, subdivision (a); there existed, at the time of the motion, more than a remote possibility that the conviction w[ould] have one or more of the specified adverse immigration consequences; and the defendant was prejudiced by the nonadvisement." (*People v. Arendtsz* (2016) 247 Cal.App.4th 613, 617.) We review the denial of a motion to vacate brought under section 1016.5 for abuse of discretion. (*Ibid*.)

We reject Gubins's contention that his plea must be withdrawn pursuant to section 1016.5 because the trial court failed to properly advise him of the immigration consequences of his plea. As was the case in his prior appeal to this court, Gubins has failed to demonstrate timeliness or establish prejudice. "A postjudgment motion to change a plea must be 'seasonably made.' [Citation.] Thus, the trial court may properly consider the defendant's delay in making his application, and if 'considerable time' has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay." (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618.) Gubins did not file his first motion until 2014, almost a decade after his 2005 conviction, and four to five years after conclusion of his immigration proceedings. Given that

his first motion was untimely, this second motion also, filed two to three years later, was not "seasonably made." (*Id.* at p. 1618.) Gubins has given no explanation for his delay and has thus failed to meet his burden to justify his untimeliness. (*Kim*, *supra*, 45 Cal.4th at pp. 1096–1097.)

With respect to prejudice, Gubins argues that he was not advised that he could be excluded from admission to the United States and would be prohibited from naturalizing—relief for which he claims he was otherwise eligible as a legal permanent resident. Although he asserts his status repeatedly in his briefs, Gubins offered no proof of his legal permanent resident status to the trial court. His declaration states that he "emigrated to the United States with a green card" on May 15, 1950. The documentation contained in the record, however, reflects that he entered the country on a four-month temporary visa in 1950. Thus, there is no basis to believe that Gubins was a legal permanent resident or would have been eligible for admission or eligible to become a naturalized citizen on the basis of his status. To the extent that he suffered any adverse consequences, it was due to the order of removal of which he was unequivocally informed in the plea colloquy. The trial court did not abuse its discretion in denying Gubins's motion to vacate his plea under section 1016.5.

Section 1473.7

Section 1473.7 provides in pertinent part: "A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for . . . the following reason[]: [¶] (1) The conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a).)[8] The "prejudicial error" specified in section 1473.7 includes ineffective assistance of counsel in connection with the conviction or sentence, which defendant must establish by a preponderance of the evidence. (See *People v. Perez* (2018) 19 Cal.App.5th 818, 828; § 1473.7, subd. (e)(1).) We independently review the denial of a defendant's motion to withdraw a no contest plea and vacate a conviction based on counsel's alleged ineffective assistance in failing to adequately inform the defendant of the immigration consequences of the plea. (*People v. Tapia* (2018) 26 Cal.App.5th 942, 950; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.)

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[8] Section 1473.7 became effective on January 1, 2017, and there is no dispute about the timeliness of Gubins's efforts to seek relief under this statute. (Stats. 2016, ch. 739 (A.B. 813), § 1, eff. Jan. 1, 2017.)

To prove ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) In the context of counsel's alleged deficient performance in connection with the entry of a plea, a defendant "must show 'that a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty' [citation] to the charge . . . , which subjected him to . . . deportation." (*People v. Patterson* (2017) 2 Cal.5th 885, 901.) A defendant "must prove prejudice that is a "'demonstrable reality," not simply speculation.' [Citation.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) A defendant's "assertion he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence.' [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 253 (*Resendiz*), disapproved on another ground in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370.)

To the extent that Gubins's contention under section 1473.7 is premised on the court's failure to adequately advise him under section 1016.5, we reject that basis for his argument for the reasons already discussed.

With respect to Gubins's argument that counsel's incorrect advice prejudicially impaired his ability to meaningfully understand and knowingly accept the adverse

immigration consequences of his plea under section 1473.7, his contention fails because he has not established prejudice.

There is no basis in the record to conclude that Gubins would have gone to trial or negotiated an agreement more favorable to him. "A defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.) Even if his declaration was sufficient to establish prejudice, it states only that he "would necessarily have held out in the hope, real or imagined, that an immigration safe disposition could have been reached, or taken my chances with trial." Gubins does not indicate how his attorney could have brokered an "immigration safe" disposition. Simple kidnapping is both a crime of moral turpitude and an aggravated felony under the INA. Gubins has a prior forgery conviction, and forgery is also a crime of moral turpitude. He points to no lesser crime to which he could have pleaded that would have resulted in more favorable immigration consequences.

With respect to his declaration that he would have gone to trial, Gubins offers no evidence to support a reasonable belief that he could have avoided conviction. In his opening brief, Gubins argues that the "mastermind" of the crimes was acquitted by a jury, and that at the time of his plea he had reason to believe that the evidence against him was obtained through an illegal search. Neither claim is

mentioned in his declaration, however, and there is no other evidence in the record that supports his assertions. As we have discussed, there is also no evidence that he would have been eligible for admission to the United States or for naturalization, because there is no proof that he was a legal permanent resident. Gubins was made aware that he would be deported as a result of the plea, and that is the consequence from which his complaints arise.

Gubins is an immigrant of unknown status who faced a maximum exposure of three life sentences. He received a sentence of only five years and has been allowed to remain in the United States despite his conviction, with the minor inconvenience of required check-ins with ICE every 6 to 12 months.[9] "Based upon our examination of the entire record, [Gubins] fails, ultimately, to persuade us that it is reasonably probable he would have forgone the distinctly favorable outcome he obtained by pleading, and instead

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[9] Gubins's declaration also states that he was "depriv[ed]" of his "earned social security." It does not state that he paid social security and, if so, the amount of his contributions, and there is no other evidence of social security contributions in the record. Gubins offered no evidence that he was entitled to collect social security even if he did make contributions—there is no proof of his immigration status at the time the plea was taken. Even if we were to conclude that counsel had a duty to advise Gubins of such an attenuated consequence—an issue that we need not and do not address—it is impossible to assess whether Gubins in fact suffered this alleged prejudice.

insisted on proceeding to trial, had trial counsel not misadvised him about the immigration consequences of pleading guilty." (*In re Resendiz*, *supra*, 25 Cal.4th at p. 254.)

DISPOSITION

The trial court's order denying Gubins's motion to vacate is affirmed.

MOOR, J.

We concur:

RUBIN, P.J.

BAKER, J.